IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 90 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHAVESH HARIBHAI AUD

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 90 of 2002

MS SUBHADRA G PATEL for Petitioner No. 1

MR DP JOSHI, AGP for Respondents No. 1-3

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 07/02/2002

ORAL JUDGEMENT

1. Commissioner of Police, Rajkot City, Rajkot, passed an order on the 1st December, 2001, in exercise of powers under Section 3(1) of the Gujarat Prevention of Anti-Social Activities Act, 1985 ("PASA Act" for short), detaining the petitioner under the provisions of the said

Act.

2. The detaining authority took into consideration five offences registered against the petitioner, so also the statements of two anonymous witnesses. The detaining authority considered the activities of the detenu as that of a bootlegger and observed that the petitioner is required to be immediately prevented from pursuing his activities, which are detrimental to public order. The detaining authority exercised powers under Section 9(2) of the PASA Act after recording a satisfaction that the fear expressed by the witnesses qua the detenu is genuine. The authority also considered the possibility of resorting to less drastic remedies and came to conclusion that detention under PASA Act is the only remedy that can be resorted to.

3. The petitioner challenges the order of detention on various grounds. Ms. Patel, learned advocate appearing for the petitioner, has restricted her arguments to the ground that there is improper exercise of powers under Section 9(2) of the PASA Act. She submitted that there is total lack of material to indicate that the detaining authority had undertaken the exercise of verifying the genuineness of the fear expressed by the witnesses and the need for maintaining anonymity regarding identity of the witnesses. She submitted that, in light of the decision rendered by a Division Bench of this Court in Kajalben G. Sindhi v. Commissioner of Police, 2000(2) GLR 1296, mere statement by the detaining authority in the affidavit-in-reply that he was subjective satisfied will not be sufficient. There has to be contemporaneous material to indicate the exercise undertaken by the detaining authority. She submitted further that certain documents supplied to the detenu in respect of the registered offences are not legible and this has affected the right of the detenu of making an effective representation under Article 22(5) of the Constitution. She submitted that the petition may, therefore, be allowed.

4. Mr. Joshi, learned Assistant Government Pleader, has opposed this petition.

5. Having regard to rival side contentions, it has to be stated, at the outset, that there is no material to indicate that the detaining authority had except interrogating the anonymous witness, undertaken any exercise to satisfy himself about the correctness and genuineness of the fear expressed by the witnesses. The detaining authority has to take into consideration the

background, the antecedents, the character, etc. of the detenu while considering the need for exercise of powers under Section 9(2) of the PASA Act. The authority has to scale the right of the detenu of making an effective representation on the one hand and the public interest on the other and has to strike a balance between the two. There is no contemporaneous material to indicate undertaking of such exercise by the detaining authority and, therefore, the exercise of powers under Section 9(2) of the PASA Act can be taken to have vitiated. The detaining authority has to carefully examine that the alleged apprehension is not imaginary or fanciful or that it is not merely an empty excuse invented by the informant. No reliance, therefore, can be placed on these statements for sustaining the order of detention. There is improper exercise of powers under Section 9(2), as there is no material to indicate the exercise as stated above.

5.1 In this regard, decision in the case of Bai Amina v. State of Gujarat & Ors., 1981 GLR 1186 which later on came to be confirmed by a Full Bench of this Court in Chandrakant N. Patel v. State of Gujarat 1994(1) GLR 761 and Kajalben G. Sindhi v. Commissioner of Police 2000(2) GLR 1296 may be employed in service wherein the above principles have been laid down. Mere say in the affidavit-in-reply filed by the detaining authority that it was subjectively satisfied about the need will not suffice. There has to be contemporaneous record with regard to formation of such opinion or satisfaction regarding withholding of names and material particulars by the detaining authority. In the instant case, nothing is stated in the grounds of detention. The satisfaction recorded by the authority in exercise of powers under Section 9(2) of the PASA Act would, therefore, result into infringement of right of the detenu envisaged under Article 22(5) of the Constitution of India, which would vitiate the detention.

6. So far as the registered offences are concerned, the contention is that certain documents supplied to the detenu in respect of the registered offences are not legible. Learned Assistant Government Pleader, after verifying, concedes to this. This Court also finds that some of the documents supplied to the detenu in respect of the registered offences are not legible. This has affected the right of the detenu of making an effective representation enshrined under Article 22(5) of the Constitution and, therefore, the continued detention is bad. The petition, therefore, deserves to be allowed.

7. In the result, the petition is allowed. The impugned order of detention dated the 1st December, 2001, passed against the detenu is hereby quashed. The detenu-Bhavesh Haribhai Aud is ordered to be set at liberty forthwith, if not required in any other matter. Rule is made absolute with no orders as to costs.

8. Direct service is permitted.

[A.L. DAVE, J.]

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